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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 300

CHARLES F. BRANNAN, Secretary of Agriculture of the United States, PETITIONER

v.

CHARLES KASS, Individually and Trading as BABYLON MILK AND CREAM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled cause on April 30, 1952.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (II R. 101-113)[1] is reported in 196 F. 2d 791. The opinion of the District Court (I R. 82) is not reported.

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[1] For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the court below, herein designated "I R.", and the appendix to the brief for the United States in the court below, designated "II R." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to the government's brief.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 30, 1952 (II R. 114). The time for filing this petition was, on July 21, 1952, extended by order of Mr. Justice Clark to and including August 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

The New York milk order, issued pursuant to the Agricultural Marketing Agreement Act of 1937, provides for the classification, pooling, and pricing of all milk delivered by producers to "pool plants," and requires, with respect to non-pool milk and milk products that are disposed of in the marketing area, that certain payments on the non-pool milk and the "milk equivalent" of the milk products be made by the handlers to a producer-settlement fund to prevent surplus non-pool milk from displacing the pool milk. The question here involved is whether the requirement for such payments is authorized by Section 8c(7)(D) of the Act as "incidental" and "necessary" to the provisions of the order specifically authorized by the Act, and not inconsistent with the requirements of the Act for uniform prices.[2]

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[2] The respondent presented the following additional issues in the pleadings, some of which were discussed in the dissenting opinion, but not in the majority opinion, in the Court of Appeals: Whether the payments required by the order (1) are "inconsistent" with § 8c(5)(G) of the statute which requires that a milk order not prohibit or limit the marketing of other-source products in a marketing area; (2) are violative of the

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The pertinent statutory provisions are set forth in Appendix A, *infra*, pp. 22-27.

The order involved is Order No. 27 (7 CFR 1945 Supp. § 927.1 *et seq.* and 1946 Supp. § 927.2 *et seq.*) regulating the marketing of milk in the New York Area, the pertinent sections of which are set forth in Appendix B, *infra*, pp. 27 to 40.

STATEMENT

The respondent is a milk dealer whose place of business is in Suffolk County, New York (I R. 2). He purchased certain quantities of cream and plain condensed milk from a dairy plant in Orrville, Ohio, a plant not included in the New York milk area pool, and resold these products to ice cream plants within the New York marketing area (I R. 31-32). Since these products were obtained from a non-pool source, the New York milk order, by Section

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due process clause of the Fifth Amendment to the Constitution, and also violative of Article I, Section 8, Clause 1, of the Constitution; (3) are without an adequate evidentiary basis, and (4) are within the scope of the notice of the rule-making proceeding, on which these provisions in the order are based. Also inherent in the case, though not discussed by the court below, is the question of whether the respondent, who is a milk handler, can be heard on the issue of lack of uniformity in payments to dairy farmers.

927.9(h),[3] required the respondent to make payments in an amount there provided to the producer-settlement fund established as an essential part of the pooling provisions of that order. The respondent paid about $10,000 into this fund under protest, and commenced proceedings in the Department of Agriculture under Section 8c(15)(A) of the statute (7 U. S. C. 608c(15) (A)) to recover the payments, on the ground that their exaction was not authorized by law (I R. 85-93). The Judicial Officer[4] of the Department denied the respondent's petition, and respondent thereupon instituted a proceeding in the district court to review that ruling under Section 8c(15) (B) of the Act. The district court affirmed the ruling of the Judicial Officer. On appeal the judgment of the district court was reversed by the Court of Appeals for the Second Circuit on the ground that the payments required to be made to the fund resulted in an

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[3] This section was renumbered as § 927.78 in the revised order in the Federal Register on December 22, 1951 (16 F. R. 12852). But there was no substantive change with respect to these regulatory provisions in the revised order, and the relevant sections in the order are referred to herein by the identifications used in the majority opinion in the Court of Appeals. The payments involved in this case were originally provided for by § 927.8(e) of the order, but by amendment the section was renumbered as § 927.9(h). See Appendix B, *infra*, pp. 37-40.

[4] The Judicial Officer acted for the Secretary of Agriculture of the United States pursuant to the authority delegated (10 F. R. 13769) under the Act of April 4, 1940, c. 75, 54 Stat. 81, 5 U. S. C. § 516a *et seq.*, which provides that whenever a delegation is made under the statute "all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture."

absence of uniformity in prices between the milk products purchased from the non-pool source and the milk equivalent of those products purchased from producers supplying the pool in the area. This, the court held, was inconsistent with Section 8c(5)(A) of the Act.[5] Judge Learned Hand dissented.

REASONS FOR GRANTING THE WRIT

This case involves a question of basic importance and wide applicability in the administration of the Agricultural Marketing Agreement Act of 1937 and the 45 milk orders effective under that Act. Directly, the order of the Court of Appeals invalidated one of the vital parts of the New York milk order.[6] At the same time, it casts a serious cloud on the legality of comparable provisions in the 44 other milk orders in effect under the Act. Unfortunately, the various parts of a milk order do not stand alone. The purpose of the section here involved is to protect the minimum price and pooling provisions of the New York order from being undermined by milk and milk products from other sources. Although there is a suggestion in the court's opinion that the defect it found in the present order might have been cured by the production of appropriate

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[5] Additional issues presented in the respondent's pleadings were not considered in the majority opinion, but the dissenting opinion concludes that these additional contentions by the respondent were also without merit.

[6] In 1951, approximately seven billion pounds of milk were classified under this order and priced at approximately $318,000,000. New York Milk Market Administrator's Bulletin (February, 1952), volume 12, number 2, page 19.

facts at the hearing supporting the promulgation of the order, the factual support deemed necessary by the court, as is pointed out below, does not exist. Nor does the court's decision appear to permit any effective substitute for the provisions stricken out since the uniformity it requires is not possible of attainment. In short, the opinion, unless reversed by this Court, very seriously impairs the operation not only of the New York order, but of the other orders containing comparable provisions.

The section here involved was held invalid by the Court of Appeals on the ground that it was inconsistent with Section 8c(5)(A) of the statute—the same statutory ground relied on in *Brannan* v. *Stark*, 342 U. S. 451. The *Stark* case is the only one relied on by the court below and the majority opinion states that although the case "is not a precise authority for the case at bar, we think it tends to support our decision" (II R. 108). Certainly, the specific holding of the *Stark* case is inapplicable here. Non-pool milk and non-pool milk products were not involved in the *Stark* case. The payments to cooperative associations of producers which were invalidated in that case were payments from the producer-settlement fund, while the payments involved in this case are payments by handlers to the producer-settlement fund. The purposes of the payments in the two cases are entirely different. If the basis for decision in the *Stark* case is interpreted to require the holding of the court below, it restricts the authority of the Secretary to such an extent that the statutory plan can no longer be

effectuated. We urge that the application of the *Stark* case adopted by the court below is neither necessary nor appropriate, and that this Court should accept review of this case in order that such a result may be avoided.

The New York order provides for the classification, pooling, and pricing of all milk delivered by producers to "pool plants," and the provisions in the order that were nullified in this case provide for certain payments by handlers to the producer-settlement fund on "non-pool" milk and the "milk equivalent" of the "non-pool" products disposed of in the marketing area.[7] The importance of the distinction betwen "pool" and "non-pool" milk payments is indicated by the fact that the Secretary of Agriculture has found it necessary to distinguish between the treatment of pool and non-pool milk in all of the 45 milk orders in effect under the Act. All of those orders provide for the classification, pooling, and pricing of the regular source of supply of milk, and then in various ways provide for regulation of milk and milk products from other sources. See, for example, *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 92-93 (C. A. 8), certiorari denied, 329 U. S. 788, in which somewhat similar provisions in the St. Louis order were

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[7] The term "milk equivalent" means the amount of raw milk needed to produce a given quantity of the product. For example, about 10 pounds of cream are made from 100 pounds of raw milk containing 3.5 percent butterfat. Hence the "milk equivalent" of 10 pounds of cream is 100 pounds of milk. The product must be converted to "milk equivalent" in order to compute the payments in this case. The regulations provide the necessary conversion factors (7 CFR § 927.105).

upheld as being necessary to encourage the use of local milk in order to attain the declared purpose of the Act.[8] See also the Table incorporated as Appendix C to this brief, *infra*, pp. 40-44. A narrow reading of the classification, pricing, and pooling provisions of the statute was rejected in *Elm Spring Farm* v. *United States*, 127 F. 2d 920, 926-927 (C. A. 1), and the court emphasized that the circumscription of the regulatory pricing scheme "is an intensely practical business."

The "pool plant" scheme of regulation was included in the order by way of amendments on August 1, 1945.[9] Under the program in effect prior to the new plan that became effective August 1, 1945, all of the milk received at a plant approved by the health authorities in the marketing area was classified, pooled, and priced under the order irrespective of whether the milk was disposed of in, or outside, the marketing area, and irrespective of whether it was for fluid use or for manufacturing purposes. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332, 334-336 (C.A. 3), certiorari denied, 338 U.S. 905. Prior to the amendments of August 1, 1945, a handler who operated a plant approved by the health authorities could use the milk to manufacture milk products throughout the year without ever supplying the market with any

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[8] The order in the *Bailey Farm Dairy Company* case provided for the classification, pooling, and pricing of milk from "producers," as defined in the order, and the "milk received from sources other than producers" was subject to an allocation formula.

[9] 10 F.R. 6156; 7 CFR 1945 Supp. 927.1 *et seq.* These provisions, so far as pertinent to this case, are set forth in Appendix B, *infra*, pp. 27-40.

fluid milk, and any such handler could obtain an abundance of milk for manufacturing purposes by paying the uniform blended price to the producers.[10] In that situation the handler was obligated under the order for the class price on the milk used in producing the manufactured products, *i.e.*, a lower price than the uniform blended price under the order, and then obtained from the producer-settlement fund a payment sufficient to enable him to pay to producers the uniform blended price. Some of the handlers found it more profitable during the season of short supply to manufacture the milk or

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[10] A market-wide pool is provided for under § 8c(5)(B)(ii) of the Act. In brief compass, the computation of the composite or uniform blended price is in this manner. The Market Administrator computes the value of milk used by each handler by multiplying the quantity used by the handler in each class by the class price and by adding the results. Then the values for all handlers are combined into one total. That total is decreased or increased by several necessary subtractions or additions. The resulting total is then divided by the total quantity of milk that is priced under the order, and the result thus obtained is the basic or uniform blended price. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 555; *Stark* v. *Wickard*, 321 U.S. 288, 300-301. Under § 8c(5)(B)(ii) of the Act, the uniform blended price is paid "irrespective of the uses made of such milk by the individual handler to whom it is delivered". A handler who has a use or class value for milk higher than the average for the market pays into the producer-settlement fund an amount equal to the use value in excess of the average, and a handler who has a use or class value for milk lower than the average for the market withdraws from the producer-settlement fund an amount equal to the difference between his use value and the average for the market. In this way all handlers are enabled to pay the uniform blended price. Under the "pool plant" scheme of regulation that has been in effect since August 1, 1945, the class prices and the uniform blended price relate only to the milk of "producers" who deliver their milk to "pool plants," and the exactions on non-pool milk and the "milk equivalent" of non-pool products disposed of in the marketing area constitute "additions" to the producer-settlement fund in the computation of the uniform blended price.

to divert it to other markets, but during the surplus season these handlers unloaded large quantities of surplus milk and milk products in the area (II R. 1-32, 72-74, 90-92). In this way the handlers were failing to deliver the fluid milk to the marketing area when it was urgently needed in the fall and winter months of short supply, and at the same time these handlers were "riding" the pool in the spring and summer months of surplus supply (II R. 65, 68, 97). This practice had the effect of bringing about an unduly low uniform blended price and thereby unduly reducing the returns of producers whose milk was regularly distributed in the marketing area, and also the practice resulted in a failure to provide an adequate supply of milk for the fluid milk market in the fall and winter months of low production.[11]

The 1945 amendment to the New York milk order defined pool plants to include those which have their milk available whenever it is needed in the marketing area.[12] It is uncontroverted that under

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[11] Additional objections to the pooling and pricing of all milk that is approved by the health authorities are: (1) In all metropolitan milksheds there are handlers whose main business is outside of the regulated marketing area, but they have some fringe sales in the area. Since prices under an order are generally higher than the market price in unregulated markets, the application of the order to *all* of the milk at the handler's plant would, in some instances, be unduly burdensome and would contribute in no substantial way to the attainment of the legislative goal. (2) Some handlers supply milk, from one plant, to different markets under Federal orders, and subjecting a handler to two orders requires some adaptation in order to enable the handler to continue in business in both markets.

[12] Under § 927.3(a) of the order, reserve pool plants qualify as pool plants on the basis of the Secretary's determination that their milk is available for shipment to the marketing area

the "pool plant" method of regulation in effect since August 1, 1945, numerous non-pool plants have approval by the health authorities for the marketing of non-pool milk and its products in the New York metropolitan marketing area, and that in the absence of the payments on non-pool milk and the "milk equivalent" of its products, as provided for in the order, substantial quantities of non-pool milk and non-pool milk products would be disposed of in the marketing area. If the non-pool milk and its products are entirely free from regulation under the order, there can be no doubt that the dumping of surplus milk and milk products from non-pool plants will render ineffective the regulatory scheme. This market has had experience in the operation of a State order that was inapplicable to out-of-State milk that came into the marketing area (see, *Baldwin* v. *Seelig*, 294 U. S. 511), and the State program was abandoned because the unregulated milk undercut and devitalized the program.[12] The producers who deliver their milk to the "pool plants" of handlers for use on the fluid milk market in the marketing area constitute the permanent productive force in the

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even though it is not always actually shipped to the marketing area. Under certain circumstances the shipments from a reserve pool plant must comply with the requirements specified, for that period, by the Secretary. Under § 927.3(b) of the order, other plants can qualify as pool plants by shipping the requisite percentage—specified in that section—of their milk as fluid milk to the marketing area. See, Appendix B, *infra*, pp. 29-31.

[12] Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), p. 227; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 334, 340.

market, and there must be some regulation of the milk from non-pool plants so as to guard against the non-pool milk and milk products displacing the regular source of supply, and thereby bringing about disorderly marketing that contravenes the declared purpose of the Act.

In the present case, the respondent purchased milk products, namely cream and plain condensed milk, from a non-pool plant. In calculating the payment due the fund as a result of these purchases, two methods were used. During the first period the products purchased were derived from milk the handling of which was not regulated by a Federal order and during that time the payments consisted of the difference between the minimum price in the New York area for the milk equivalent of the cream and plain condensed milk as fixed for those uses and the Class IV-A price for milk, namely, the price of milk used in manufacturing butter. Later the milk from which the products were derived was handled under a Federal milk regulation for the Cleveland area, and during that period the payments were calculated on the difference between the minimum price for the milk equivalent of the products for such use under the New York order and the price applicable to milk for that use under the Cleveland order. The amount of these payments was determined by application of Section 927.9(h) (2) (i) and (ii), Appendix B, *infra*, pp. 37-38. The amount of the payment, in all instances provided for by the order, is determined solely on the basis of what is reasonable and necessary to

protect the pool plan milk from being displaced by milk from other sources. Surplus non-pool milk and cream are generally available at a price which would permit such milk and cream to displace pool milk in the higher priced classes (II R. 28). The payments required by the order afford a reasonable protection of the "pool plant" method of regulation (II R. 31-32), and are auxiliary requirements under the "incidental" and "necessary" authorization in § 8c(7) (D) of the Act.[14]

The majority opinion in the Court of Appeals expressed the view that "there is no substantial evidence in the record of the promulgation hearings which would indicate that the initial cost of non-pool cream and condensed milk would be the New York Class IV-A price," and that since the payment is computed on the basis of Class IV-A price rather than "actual cost" to the handler, it "is a price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area" (II R. 107). But the court is attempting to compare, in this respect, incommensurables. No such "uniformity" is possible, and no evidence, substantial or otherwise, can be adduced to meet the Court's requirement. The various class prices

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[14] Whenever there is an inadequate supply of cream or plain condensed milk, the Market Administrator is directed, under § 927.9 (h) (2) (iv) of the order, to declare an emergency period in which the payments on the non-pool cream and plain condensed milk will be properly related to the open market price for cream in the East.

in the order are for raw milk as delivered by producers. The order fixes no class price for a milk product. The Class IV-A price is the *minimum* class price for "all milk the butterfat from which leaves or is on hand at a plant in the form of butter."[15] That minimum price for milk received from producers is not expected to be "uniform" with the market price for plain condensed milk and cream—purchased by the respondent in this case—at non-pool plants. The plain condensed milk and cream are processed from raw milk, and expenditures are necessary in that processing, for manufacture, transportation, marketing, and possibly storage. Also the Class IV-A price for milk purchased from producers is not expected to be "uniform" with the market price of butter at non-pool plants or even at pool plants. The Class IV-A price is merely the price for milk, purchased from producers, that is used in butter, and it does not include the additional amount that would be relevant in fixing a price for a manufactured product.

No evidence is obtainable that the market price for the respondent's manufactured products, purchased by the respondent from a dealer at a non-pool plant in Orrville, Ohio, is the same as the Class IV-A price to producers for raw milk. The design of the order is not to obtain the "uniformity" referred to by the court. No such uniformity is required by the Act. The requirement in § 8c(5)(A) of the statute relates only to class prices "for milk purchased from producers or associations of pro-

[15] § 927.4 (c) (11) of the order, Appendix B, *infra*, p. 35.

ducers." It has been held that the "immediate object of the Act is to fix minimum prices for the sale of milk by producers to handlers." *Stark* v. *Wickard,* 321 U. S. 288, 291.

A regulatory provision for the payment to be based on the "actual cost" or the "initial cost" of the milk product, as required by the Court of Appeals in this case, would not only be incongruous with the minimum class prices for milk of producers under the order, but any such requirement would be ineffective, even if a proper comparison could be established in the order, because a handler would know that whatever he might save by bargaining for a lower price would, under those circumstances, have to be paid into the producer-settlement fund under the order. Transactions between corporate affiliates would manifestly present a situation in which the regulatory requirement, based on "actual cost," would be impracticable. In addition, the Act provides for minimum prices to producers for their raw milk, and it "does not forbid sales at prices above the minimum." *Stark* v. *Wickard,* 321 U. S. 288, 291. The statutory requirement for "uniformity" relates only to the minimum prices authorized under § 8c(5)(A) and § 8c(5)(B), and actual cost may include in some instances a premium above the minimum price.

With respect to the plain condensed milk and cream in this case that was priced under the Cleveland order, the Court of Appeals held that the class price for the milk under the Cleveland order "is a fair indication of the price actually paid by a New

York handler for non-pool Ohio milk products." However, the court concluded that the exaction in this case is invalid since "in most cases it will not be the exact cost." (II R. 108.) But the price under the Cleveland order is for raw milk, and that price is never expected to be the "exact" cost of a manufactured product. Moreover, the only "uniformity" required by § 8c(5) (A) of the Act relates to the "minimum prices for milk purchased from producers," and those prices "shall be uniform as to all handlers." The respondent purchased the plain condensed milk and cream in this case from a handler in Orrville, Ohio, and the uniformity requirement in § 8c(5) (A) does not apply to these transactions because the price paid was to another handler, and not to producers for their milk.

It would also be administratively unworkable to require "uniformity" between the minimum class prices to producers for milk under the order and the prices received by the dairy farmers who produce the non-pool milk disposed of as milk or milk products in the marketing area. Some handlers engage in the business of handling almost all of the various dairy products, some of which are storable for long periods of time and are purchased on the nation-wide market, and tracing these milk products back to their original sources and ascertaining the price paid to the producers for their raw milk would be impossible.

The exaction on non-pool milk and the "milk equivalent" of its products is not a "price" under

§ 8c(5)(A) of the Act, and there is, therefore, no requirement for "uniformity" in this respect. The majority opinion in the Court of Appeals held that the payments in this case "are part of the 'minimum price' as that term is used in § 8c(5)(A) of the Act" (II R. 107). But the payments that are required on non-pool milk and the "milk equivalent" of its products are made to the producer-settlement fund, and the uniform blended price under the order is paid only to the "producers," who deliver their milk to "pool plants." Hence, under the terms of the order the challenged payments to the producer-settlement fund are not payments "for milk purchased from producers," and are not, therefore, violative of the uniform price under § 8c(5) (A) of the Act. As Judge Learned Hand said in the dissenting opinion (II R. 112):

> The provisions in suit do not do that [*i.e.*, fix a "price" for milk purchased from "producers"]; they fix no prices "for milk purchased from producers" at all, if by "price" is meant the money that eventually goes to producers in payment for their milk. The differential exacted from a "non-pool" handler is not the "price" of anything . . . The provisions in suit can indeed be deemed "inconsistent" with this [§ 8c(5) (A) of the Act], if one reads "all producers" to include "non-pool" producers, for the differential is not paid to the "non-pool" producers; and indeed, even if it were, it would not make the price paid to such a producer the same price as that paid to other producers. However, it is apparent that

such producers were not intended, for if they were, "non-pool" producers whose milk came into competition with a "pool" would be automatically included in the "pool".

If the term "producers" in the Act necessarily includes, as a matter of law, all dairy farmers whose milk or the products thereof are disposed of in the marketing area, the entire pool plant scheme of regulation would be nullified. The term "producers" is used at various places in the Act, and if it necessarily includes all such dairy farmers then it would follow that the uniform blended price under § 8c(5)(B)(ii) of the statute must be paid to all of the dairy farmers, and not limited to the "producers" who deliver milk to the "pool plants."

It is of fundamental importance in the administration of milk orders for the Act to be interpreted so as to allow some latitude in selecting the milk that is to be pooled and priced under the order. It has been held that the language in §§ 8c(5)(A) and 8c(5)(B) of the Act is not to be read with "literalness or consumptive ultimacy." *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 94 (C.A. 8), certiorari denied, 329 U.S. 788. In *H. P. Hood & Sons* v. *United States,* 307 U.S. 588, 597-598, the term "producer" as defined by the Secretary, for the purpose of conducting a referendum under the Act, was upheld even though the definition excluded some dairy farmers outside the customary milkshed who delivered cream to handlers for shipment to the marketing area.

Assuming, *arguendo,* that the payment in this

case is a part of the "price" under § 8c(5)(A) of the statute, it is of fundamental administrative importance that the statutory requirement for minimum prices "uniform as to all handlers" receive the usual interpretation that permits uniformity within reasonable classification. Uniformity is observed by proper classification under which the rule uniformly applies to all persons similarly situated. *Nicol* v. *Ames*, 173 U. S. 509, 521-523; *Patton* v. *Brady, Executrix*, 184 U. S. 608, 622-623; *Fernandez* v. *Wiener*, 326 U. S. 340, 359-360. The record shows the reasonableness and the compelling need for the classification in this instance, and under the order there can be no question that the provisions apply uniformly to all persons similarly situated.[16]

The respondent presented additional issues, in the pleadings (I R. 8-11) and on appeal to the Court of Appeals, that were not resolved by the Court of Appeals [17] but which may be relied on by the respondent in support of the result in the respond-

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[16] It is also relevant to notice that the payments are alleged (I R. 89) by the respondent to be illegal because of the averred failure to "price," in a uniform manner, the milk of pool-producers and dairy farmers. The respondent's allegation, in effect, is that all of the producers, as the respondent interprets that term in § 8c(5)(A) of the Act, should have their milk "priced" under § 8c(5) of the Act. The respondent, as a handler, has no standing to make a complaint on behalf of the dairy farmers. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 571-572; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 463; *American Power Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 107; *Tileston* v. *Ullman*, 318 U. S. 44, 46.

[17] Judge Learned Hand's dissenting opinion gave consideration to the additional issues urged by the respondent in that court (II R. 112-113).

ent's favor in the Court of Appeals. *Morley Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191; *Langnes* v. *Green*, 282 U. S. 531, 535-537. An issue that is important from an administrative standpoint is the contention by the respondent (I R. 10) that the payments are violative of § 8c(5)(G) of the Act, which provides that an order "applicable to milk and its products" shall not "prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area of the United States."

To be sure the payments may, in a collateral way, affect the marketing of milk or milk products, but if there is to be any regulation at all under the statute, a mere collateral effect cannot be regarded as creating, under § 8c(5)(G) of the Act, an inflexible barrier to the regulation of milk or milk products.[18] As stated in the dissenting opinion by Judge Learned Hand (II R. 113), the language in § 8c(5) (G) "strongly suggests that it was directed only against any express quantitative limit." No quota is prescribed by the order, and the payments in this case apply uniformly to all non-pool milk and the "milk equivalent" in non-pool milk products disposed of in the marketing area irrespective of the place of production. The order does not de-

[18] It was held in *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87 (C.A. 8), certiorari denied, 329 U.S. 788, that the marketing of milk may be limited but not prohibited if it is from another production area. That case did not, however, include the marketing of milk products, but it was stated by the court that the reference to "limit" in § 8c (5) (G) of the Act relates to milk products.

lineate production areas or provide in any way for discrimination or distinction that as based on a production area, and therefore § 8c(5) (G) of the Act is irrelevant in this case.[19]

The Court of Appeals overturned the regulatory provisions in the order as a result of its construction of statutory language applicable in various respects to the 45 milk orders in effect throughout the country. The disruptive effect of the holding by the Court of Appeals is such that the Secretary believes that the administration of the Act will be seriously impaired. These issues are of such public importance that they should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

W. CARROLL HUNTER,
Solicitor.
NEIL BROOKS,
Associate Solicitor,
U. S. Department of Agriculture.

AUGUST 1952.

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[19] The other averments in the respondent's pleadings present issues which, we believe, are manifestly without merit and are not discussed herein.

APPENDIX A

The following are relevant sections of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, amending the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended (7 U. S. C. 601 *et seq.*):

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

Notice and Hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and Issuance of Order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and set forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

Terms—Milk and Its Products

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) *Providing:*

(i) for the payment to all producers and associations of producers delivering milk to the same

handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their production of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including pro-

ducers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all

markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

Terms Common to all Orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

* * * * *

APPENDIX B

The following are the relevant sections of the New York order, as amended, effective October 1, 1946 (7 F. R. 2370; 8 F. R. 6327; 10 F. R. 6156; and 11 F. R. 11115):

SEC. 927.1 *Definitions.*—The following terms shall have the following meanings:

(a) "Act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended.

(b) "Secretary" means the Secretary of Agriculture, or the War Food Administrator, or any officer or employee of the United States

who is, or who may hereafter be, authorized to exercise the powers and to perform the duties of the Secretary of Agriculture.

(c) "New York metropolitan milk marketing area" means the city of New York, the counties of Nassau, Suffolk (except Fisher's Island), and Westchester, all in the State of New York, and is hereinafter called the "marketing area."

(d) "Person" means any individual, partnership, corporation, association, or any other business unit.

(e) "Dairy farmer" means any person who produces milk.

(f) "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

(g) "Handler" means (1) any person who engages in the handling of milk, or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (2) any person who engages in the handling of milk, cultured or flavored milk drinks, cream, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (3) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

(h) "Plant" means the land, buildings, surroundings, facilities, and equipment, whether owned or operated by one or more persons,

constituting a single operating unit or establishment for the receiving, handling, or processing of milk or milk products as determined by the market administrator pursuant to Sec. 927.2 (d) (10.)

(j) "Pool plant" means any plant which is designated as a pool plant pursuant to Sec. 927.3.

(k) "Market administrator" means the agency, which is described in Sec. 927.2, for the administration of this order.

* * * * *

SEC. 927.3 *Pool plants.*—A plant shall be designated as a pool plant pursuant to either (a) or (b) of this section.

(a) *Reserve plants.*—

* * * * *

(3) *Requirements.*—In order to qualify as a pool plant pursuant to this paragraph, the person operating the plant shall meet each of the following requirements: (i) be willing to ship in the form of milk to the marketing area, milk received at the plant from dairy farmers; (ii) keep such control over the sanitary conditions under which milk received at the plant is produced and handled, that the plant can meet the requirements of a source of milk for the marketing area: *Provided,* That approval by a health authority of the plant as a source of milk for the marketing area shall constitute sufficient evidence that this requirement is being met even though such approval is re-

stricted to prohibit shipment to the marketing area of milk for specified periods during which permission is given by such health authority for receiving unapproved milk or skim milk at the plant; and (iii) have no commitments for disposition of milk that prevent him from utilizing milk as set forth in (4) (iv) of this paragraph.

* * * * *

(b) *Plants shipping Class I-A milk to the marketing area.*—For any month a plant from which during such month Class I-A milk, either directly or through other plants, is sold or distributed in or shipped to the marketing area, which quantity of milk during the months of July through March, is equal to more than 25 percent of the milk received directly from dairy farmers, or during the months of April through June is equal to more than 10 percent of the milk received directly from dairy farmers, shall automatically be designated a pool plant: *Provided,* That for the months of April, May, or June no plant shall be a pool plant on this basis, unless at least 60 per cent of the milk received from dairy farmers at such plant during the preceding period of October, November, and December was classified in Class I-A and, either directly or through other plants, was sold or distributed in or shipped to the marketing area in the form of milk: *Provided, further,* That no plant shall be a pool plant on this basis during the months of January through July, if the designation of the plant as a pool plant was cancelled for

failure to meet the requirements of (a) (3) (i) of this section during the preceding year.

* * * * *

SEC. 927.4 *Classification.*—(a) *Basis of classification.*—All milk, the classification of which is necessary to establish the classification of milk received from producers, and all milk entering the marketing area as milk, skim milk, cultured or flavored milk drinks, cream, or plain condensed milk, shall be classified in accordance with the form in which it is held at, or moved from, the plant at which classification is determined. Such classification shall be subject to the following conditions:

* * * * *

(c) *Classes of utilization.*—Subject to all of the conditions set forth in (a) and (b) of this section, the classes of milk shall be as follows:

(1) Class I-A milk shall be all milk, except as provided in (2) and (3) of this paragraph, which leaves a plant as milk, or cultured or flavored milk drinks containing 3.0 percent butterfat or more, and all the milk the classification of which is not established in some other class named in this paragraph.

(2) Class I-B milk shall be all milk which leaves a plant as milk, or cultured or flavored milk drinks containing 3.0 percent butterfat or more, which has not passed through the marketing area, but which is ultimately distributed in an area regulated by another order of the Secretary.

(3) Class I-C milk shall be all milk which leaves a plant as milk, or cultured or flavored milk drinks containing 3.0 percent butterfat or more, which has not passed through the marketing area, but including milk which was received directly from producers at a plant in the marketing area, and which is ultimately distributed in an area not regulated by an order of the Secretary.

(4) Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cultured or flavored milk drinks containing less than 3.0 percent butterfat or in the form of cream, sweet or sour, unless such cream is established to have been subsequently so handled or marketed as to classify such milk in some other class.

(5) Class II-B milk shall be all milk, except as set forth in (7), (8) and (9) of this paragraph, the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk, frozen desserts or homogenized mixtures; or which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse at an average temperature below zero degrees Fahrenheit for seven consecutive days and below 15 degrees Fahrenheit for at least 21 days thereafter, as shown by charts of a recording thermometer, and which is subject at all times to being inspected by a representative of the market administrator to determine the physical presence of the cream and the temperature of the room where stored. After the first seven consecutive days such cream may be moved from one li-

censed cold storage warehouse to another: Provided, That the market administrator receives notice of such removal within 48 hours thereafter. Any handler whose report claimed the original classification of milk in this class shall be liable under the provisions of Sec. 927.8 (j) for the difference between the Class II-B and Class II-A prices for the month in which the II-B classification was claimed on any such milk, if the storage of the cream does not comply with all the requirements of this subparagraph.

(6) Class II-C milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is delivered to a plant or a purchaser in the special cream area, is not moved as cream to a plant in the marketing area or delivered to a purchaser in the marketing area, and the classification of which is not established in some other class.

(7) Class II-D milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream or in the form of plain condensed milk or in the form of frozen desserts or in the form of homogenized mixtures used in frozen desserts, which is delivered to a plant or a purchaser outside the marketing area, outside the special cream area and outside New England: *Provided,* That the cream or the plain condensed milk is not moved to a plant in the marketing area, in the special cream area, or in New England, or delivered to a purchaser in the marketing area, in the special cream area, or in New England: *Provided, further,* That the frozen desserts, or the homogenized

mixtures used in frozen desserts are not moved to a plant in New York City, or delivered to a purchaser in New York City.

(8) Class II-E milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream or in the form of plain condensed milk or in the form of frozen desserts or in the form of homogenized mixtures used in frozen desserts, which is delivered to a plant or a purchaser in New England: *Provided,* That the cream or the plain condensed milk is not moved to a plant outside New England or delivered to a purchaser outside New England: *Provided, further,* That the frozen desserts or homogenized mixtures used in frozen desserts are not moved to a plant in New York City, or delivered to a purchaser in New York City.

(9) Class II-F milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk which is delivered to a plant or a purchaser in the special cream area, is not moved as plain condensed milk to a plant in the marketing area or delivered to a purchaser in the marketing area, and the classification of which is not established in some other class; or all milk the butterfat from which leaves or is on hand at a plant in the form of frozen desserts or in the form of homogenized mixtures used in frozen desserts, except as set forth in subparagraphs (7) and (8) of this paragraph, provided the frozen desserts in both instances were moved to a plant or delivered to a purchaser outside New York City and remained outside New

York City; or all milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

(10) Class III milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of evaporated milk in hermetically sealed cans, sweetened condensed milk, milk chocolate and other candy products, milk powder, other concentrated milk products or cheeses other than those specified in subparagraphs (9) and (12) of this paragraph.

(11) Class IV-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

(12) Class IV-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of Cheddar cheese, American Cheddar cheese, Colby cheese, washed curd cheese, or part-skim Cheddar cheese.

(13) Class V-A milk shall be the skim milk in all milk, which skim milk enters the marketing area in the form of fluid skim milk or cultured or flavored milk drinks containing less than three percent butterfat, or which is not accounted for in some product leaving or on hand at a plant.

(14) Class V-B milk shall be the skim milk in all milk which skim milk is not classified pursuant to (13) of this paragraph.

* * * * *

§ 927.7 (b) *Computation of the uniform price.*—The market administrator shall, on or before the 14th day of each month, audit for

mathematical correctness and obvious errors the report submitted for the preceding month by each handler. If the unreserved cash balance in the producer-settlement fund to be included in the computation is less than 2 cents per hundredweight of milk received from producers on all reports, the report of any handler who has not made payment of the last monthly pool debit account rendered pursuant to Sec. 927.8 (g) shall not be included in the computation of the uniform price. The report of such handler shall not be included in the computation for succeeding months until he has made full payment of outstanding monthly pool debits. Subject to the aforementioned conditions the market administrator shall compute the uniform price in the following manner:

(1) Combine into one total the net pool obligations of all handlers;

(2) Subtract the total of payments required to be made for such month by Sec. 927.8(d);

(3) Add the total payments required to be made by handlers for such month pursuant to Sec. 927.8(e);

(4) Add the amount of unreserved cash in the producer-settlement fund;

(5) Subtract an amount equal to not less than 4 cents nor more than 5 cents per hundredweight of milk received from producers to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers;

(6) Subtract the Class I-C milk of all handlers whose reports are included in this

computation from the total milk received from producers by all such handlers; and

(7) Divide the result obtained in (5) by the result obtained in (6). The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants in 201-210 mile zone.

* * * * *

§ 927.9 (h) *Payments for milk or milk products other than producer sources.*—(1) Payment shall be made by handlers to producers, through the producer-settlement fund, for milk, cultured or flavored milk drinks, cream, plain condensed milk, or skim milk, which milk and milk product meets each of the following provisions: (i) it was derived from milk received at some plant from dairy farmers (other than the handler operating such plant) who are not producers; (ii) it was received at a plant in, or delivered to a purchaser in the marketing area, or was received at a pool plant outside the marketing area and assigned either to shipments to the marketing area of milk, cultured or flavored milk drinks, cream, plain condensed milk, or skim milk, or to plant loss; and (iii) the milk or milk equivalent of the butterfat is classified as Class I-A, Class II-A, or Class II-B, or the skim milk is classified as Class V-A.

(2) The amount of payment for the products set forth in (1) of this paragraph shall be as follows:

(i) If the milk, or the milk equivalent of the butterfat, or the skim milk is classified and

paid for under another order issued pursuant to the act, the amount of payment shall be any plus amount obtained by subtracting the value of the milk, the milk equivalent of the butterfat, or the skim milk at the class price or prices under such other order from the value computed in accordance with the classification and pricing set forth herein.

(ii) If the milk or milk product is derived from milk the handling of which is not regulated by another order issued pursuant to the act, the amount of payment shall be as follows: for milk, or for cultured or flavored milk drinks containing 3.0 percent butterfat or more, the difference between the value of such milk or cultured or flavored milk drinks at the Class I-A price in the 201-210 mile zone and the value computed at the Class IV-A and Class V-B prices; except as provided in (iv) of this subparagraph, for cream, plain condensed milk, or for cultured or flavored milk drinks containing less than 3.0 percent butterfat, the difference between the value of the milk equivalent of such cream, plain condensed milk, or milk drinks at the appropriate class (II-A or II-B) price in the 201-210 mile zone and at the Class IV-A price (milk equivalent in each case to be computed on the basis of milk containing 3.5 percent butterfat); and for skim milk (either as skim milk or in cultured or flavored milk drinks), the difference between the value computed at the Class V-A price in the 201-210 mile zone and the Class V-B price.

(iii) In the event that the source of such milk or milk product is not revealed, the amount of payment shall be the full value at the class prices in the 201-210 mile zone.

(iv) If the market administrator finds that there is an inadequate supply of cream or plain condensed milk in the marketing area and that such products are available from non-pool sources, he may declare an emergency for a period ending not more than three months from the date of such declaration, in which case the payment during the period of such declared emergency shall be the difference between the value of the milk equivalent of such cream or plain condensed milk at the appropriate class (II-A or II-B) price in the 201-210 mile zone and at the Class II-E price in the 0-250 mile zone from Boston.

(3) Payment for any milk or milk product pursuant to this paragraph shall be made only once and shall be made by the appropriate handler as set forth in the following provisions: (i) by the handler first receiving the milk or milk product at a pool plant outside the marketing area; (ii) by the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area; or (iii) by the handler operating the plant from which the milk or milk product was delivered to a purchaser in the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(4) The amount due pursuant to this paragraph shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.6 (a).

APPENDIX C

The following table contains a list of the milk orders that are relevant in this case, and the numbers relating to each order are the significant section numbers. The relevant provisions, affected by the decision in this case, are included under one of the seven categories (from A to G) listed at the top of the table. The explanation or key to these seven categories appears, *infra*, pp. 43-44.

Order	No.	A	B	C	D	E	F*	G
Boston	4	.66						.27 & .29
Cedar Rapids	31				.56(b)		.46(a)(3)	.44(b)
Chicago	41	.61			.68	.61		.45(f)
Cincinnati	65	.61					.43	.46(d)
Cleveland	75	.72(a)&(b)				.56(b)	.53(a)	.56(b)
Columbus	74				.54	.45(b)		.45(b)
Dayton-Springfield	71	.60(d)					.44(j)(3)	.44(j)(1)
Detroit	24	.60(b)						.46(c)
Dubuque	12				.6(b)(2)			.4(e)(1)
Duluth-Superior	54	.62		.61		.62		.43(a)(1)
Fall River	47							.43(d)
Ft. Wayne	32	.84(a)						.46(a)(2)
Kansas City	13	.61			.62(b)	.70(c)	.44(a)	.44(a)
Knoxville	88						.43(a)	.45(a)(2)
Lima	95	.11(a)(2)			.11(a)(1)			.4(f)(i)(iii)
Louisville	46	.61(b)					.44(a)	.46(a)(2)
Lowell-Lawrence	34	.65			.66			.25(f)&(i)
Memphis	18						.44(a)	.46(a)(2)
Milwaukee	7							.47(b)
Mpls.-St. Paul	73						.43(a)	.45(a)(1)
Muskogee	29				.61(b)		.44(a)	.49(a)(2)
Nashville	78							.45(a)(2)
Neosho Valley	28	.62(b)**			.61(b)		.44(a)	.46(a)(3)
New Orleans	42							.4(f)(1)(ii)
New York	27	.87(a)			.87(a)			.35
North Texas	43				.61(b)		.44(a)	.46(a)(2)
Oklahoma City	5				.61(b)		.44(a)	.46(a)(3)
Omaha-C.B.	35					.2(c)(6)		.2(c)(5)
Paducah	77	.62(b)						.44(b)
Philadelphia	61				.4(d)			.3(d)

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(Continued from page 41)

Order	No.	A	B	C	D	E	F*	G
Puget Sound	25	.70(b)(5)						.45(b)(2)
Quad Cities	44				.56(b)		.44(a)	.47(a)(2)
Rockford-Fpt.	91						.44(a)	.46(a)(3)
St. Louis	3		.70					.45(a)(3)
San Antonio	49				.61(b)		.44(a)	.46(a)(3)
Sioux City	48							.4(c)(4)
So. Bend-LaPorte	67							.46(c)
Springfield, Mass.	96	.65			.66		.25***	.25
Springfield, Mo.	21				.62(b)		.44(a)	.46(a)(2)
Toledo	30				.80(c)			.45(c-e)
Topeka	80	.6(b)			.6(e)	.6(b)	.4(c)(7)	.4(e)
Tri State	72							.36(a)(2)
Tulsa	6				.61(b)		.44(a)	.46(a)(2)
Wichita	68	.61 & .63		.61	.64(b)	.61		.44(b)
Worcester	99	.65			.66		.25***	.25

* Whenever non-pool milk is involved.
** Only for handlers having less than 10% of receipts in marketing area Class I.
*** Footnote * not applicable.

KEY TO IDENTIFICATION OF ORDER PROVISIONS

A. Requiring a handler, with respect to milk not priced to producers (usually called "other source milk," or "emergency milk" etc.), to pay to producers through a producer settlement fund—either as a part of the total value of milk by a handler receiving milk from producers or as a direct payment to such fund by a handler receiving no milk from producers—an amount of money computed at the difference between its utilization value and some other prescribed price.

B. Same as A, except that payment of the added amount, computed with respect to milk not otherwise priced to producers thereof, is added to the total value before computing the blended price of each handler, under an individual handler pool order. Under such an order, no such payments are possible by handlers who do not receive milk directly from producers.

C. Requiring a handler, with respect to milk not priced to producers but which was received from a specified source such as a "producer-handler" and not included in such general categories as "other source milk or emergency milk;" to pay to the pool in the same manner as those in category (A) or direct to producers as in category (B).

D. Requiring payment into a pool (either under the order where the milk is pooled or the order applicable to the area in which the milk is disposed of) with respect to milk disposed of in another federally regulated market, the plus difference, if any, between the class price in the order in which the milk is pooled, and the applicable class price specified in the order for the area in which the milk or milk product is disposed of.

E. A provision that any of the charges required by the type of provisions outlined in categories A, B, C and D is not to be made (such as a provision nullifying the charge if there is a showing that producer milk was not available).

F. Requiring milk received by one handler from another handler (pool plant) to be assigned to specified classes or under specified conditions, without reference to the actual price paid to the selling handler by the buying handler.

G. Requiring milk received by a handler from any non-producer or non-handler source to be allocated to specified classes in a specified sequence usually beginning with the lowest or lower uses of the receiving handler, without regard to the price actually paid by the receiving handler and its relation to the price for the class to which such milk is allocated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 300

CHARLES F. BRANNAN, Secretary of Agriculture of the United States,

Petitioner,

v.

CHARLES KASS, Individually and Trading as Babylon Milk and Cream Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions below are adequately stated in the petition.

Jurisdiction

The jurisdictional requisites are adequately stated in the petition.

Counter-Statement of Questions Presented

May the New York milk order, which provides for the classification of all milk, and for the pricing and pooling of milk delivered by (pool) producers to "pool plants", require that prices paid to (pool) producers include a penalty payment by a handler of non-pool milk or milk products in order to penalize and prevent any competition whatever between such non-pool supplies and pool supplies? The question here involved is whether such payment is authorized by the pricing provisions, Sections 8c(5)(A) and (B) of the Act; or by Section 8c(7)(D) as "incidental" to Section 8c(5)(A) and (B) thereof, and "not inconsistent" therewith or with any other provision of the Act, particularly Section 8c(5)(D) and Section 8c(5)(G).

Another question is whether procedural due process was afforded with respect to so much of the above payment as pertained to Class II-B milk products.

Statute and Regulation Involved

The statute and regulation involved are adequately stated in the petition.[1]

Counter-Statement of the Case

The respondent is Charles Kass, trading as Babylon Milk and Cream Company, a small milk dealer of Lindenhurst, Long Island, New York. He has been a "handler" under Order No. 27, the Metropolitan New York area milk

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[1] The reprinting of the order in Appendix B of the Petition is not the correct version in effect during most of the period involved herein, commencing August 1, 1945, as to which see I R. 15a. Specifically, Sec. 927.9(h) on p. 37 of the Petition should be numbered 927.8(e) to conform with subsection (3) on p. 36; and subsection 2(iv), p. 39, was not adopted until October 1, 1946.

order, for many years. Even before the inception of the order he bought cream and condensed milk from the plant of the Orrville Condensed Milk Company, Orrville, Ohio, for disposition in the manufacture of ice cream; this plant and the farmers delivering to it were never part of the New York order "pool".

After August 1, 1945, respondent's continued purchases from this source, which had become crucially important due to war-created shortages, became subject to a new provision of Order No. 27 effective on that date [Section 927.8(e), p. 20 of the order, I R. 15a]. Under this provision, the Secretary's Market Administrator caused respondent to pay to New York order "pool" producers, on his Orrville supplies, approximately 21 cents per quart of cream ($8.65 per 40-qt. can) and 80 cents per 100 pounds, or 2 cents per quart, of milk used as condensed milk (II R. 105, footnote 5).

Respondent made such payments to pool producers (through the producer settlement fund) under protest (in excess of $10,000). Thereafter he filed a petition for administrative relief and refund under Section 8c(15)(A) of the Act. The Report of the Office of Hearing Examiners recommended that such relief and refund be granted because (1) the payment required by the order was excessive and a "prohibitive penalty" (I R. 29a), unreasonable and in violation of Section 8c(5)(G) of the Act; and (2) with respect to Class II-B condensed milk the provision was also void for complete lack of notice or evidence.

The Secretary, through his judicial officer, refused to adopt this Report of the Hearing Examiner (I R. 31a). Thereupon further proceedings to review this ruling of the Secretary were brought pursuant to Section 8c(15)(B) of the Act. The District Court judge accepted the Secretary's ruling (I R. 82a). The Court of Appeals, per Chief Judge Swan, reversed the judgment of the District Court, Judge Augustus Hand concurring and Judge Learned Hand dissenting. An order staying the mandate was vacated and the mandate issued.

ARGUMENT

I. This case lacks public importance

A. The administrative order involved herein is no longer in effect.

In critical respects, provisions of Order No. 27 invalidated below were eliminated by the Secretary effective April 1, 1949; 14 F. R. 829, Sec. 927.9(h)(2)(ii). Although it remains necessary to adjudicate respondent's liability for the period that the challenged provisions were in effect (Sec. 927.11, p. 22 of Order No. 27, I R. 15a), respondent submits that the public importance of this case was dissipated upon April 1, 1949, by the Secretary's amendments of Order No. 27 upon that date. The penalties having been assessed against respondent mainly under a regulation later eliminated or repealed, "the question is therefore not of public importance"; *District of Columbia* v. *Sweeney*, 310 U. S. 631 (1940).

The challenged provision was originally promulgated August 1, 1945 (10 F. R. 6156) as Sec. 927.8(e) of Order No. 27; and was amended October 1, 1946 (11 F. R. 11120) as Sec. 927.9(h). The instant case involves penalties assessed during 1945 and 1946. However, the Secretary's further amendments (14 F. R. 829) effective April 1, 1949, eliminated the basis of the penalties herein, as follows:

(a) The amount of the penalty on unregulated non-pool cream, consisting of the difference between the Class II-A price (of pool milk used in cream) and the Class IV-A price (of pool milk used in butter) was reduced as follows: the subtrahend of the Class IV-A price was rescinded and a subtrahend of the Class III price (the price of pool milk utilized in manufacturing cream, based largely on the open-market price of unregulated cream) was adopted in its place, reducing the amount of the penalty substantially after April 1, 1949.

(b) So much of the penalties herein as were assessed against respondent for purchasing non-pool plain condensed milk were completely eliminated by the amendment of April 1, 1949. Such Class II-B products thereafter were termed Class III products, and not subject to the penalty provision at all.

Neither the present New York milk order [1] nor any other milk order [2] in the nation now contains the penalty provision adjudicated below. Therefore, this case does not have sufficient public importance to warrant issuance of the writ.

B. The judgment below does not impair the operation of the New York and other milk orders.

Petitioner urges (p. 6) that the judgment below "very seriously impairs the operation" of the New York and other orders. Petitioner cannot seriously advance this contention for the following reasons:

(1) The penalty provision invalidated below, insofar as it applied to milk or milk products utilized in Class II-B, was completely eliminated from the New York order in every respect on April 1, 1949; see above. The order continued to operate without impairment.

(2) Insofar as the penalty applied to Class II-A (now Class II) milk, it was substantially reduced on April 1,

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[1] The Petition, p. 4, note 3, states that in the present New York order, effective January 1, 1952 (16 F. R. 12852), former Sec. 927.9(h) was renumbered Sec. 927.78 "but there was no substantive change". Counsel for petitioner must have meant that there was no change on January 1, 1952 from the order as effective April 1, 1949 (14 F. R. 829). There has never been any question that the amendments effective April 1, 1949 made the two substantive changes, noted above, in the order in effect from August 1, 1945 (10 F. R. 6156) to March 31, 1949, involved in this case.

[2] See analysis below, p. 7.

1949 when the Class IV-A basis was eliminated therefrom; see above, p. 4. The order continued to operate without impairment.

(3) The New York order operated successfully for 7 years prior to adoption of the penalty payment therein on August 1, 1945. No payment resembling this was incorporated into any other orders until more recently, many of which orders had been operating successfully even longer than the New York order.

(4) Most federal milk orders never did and still do not contain a comparable provision and are operating successfully without it; see below, p. 8.

(5) The New York order, like all others, provides [Sec. 927.4(a)(5), p. 9 of the order, I R. 15a] that milk or cream received from pool producers shall be assigned to the highest classes (I-A and II) first, relegating non-pool milk to "the lowest or lower uses" (Petition, p. 44, par. G). This is an effective method of favoring regulated pool supplies under the statutory power of classifying[1] milk, *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. (2) 87, cert. den. 329 U. S. 788 (1946), which is different from imposing a discriminatory charge or penalty directly against milk or milk products otherwise unregulated. This assignment-of-highest-classification method has prevented impairment of these orders in the 25 markets which have no penalty clause whatever on otherwise unregulated milk, and in such of the remaining 19 markets as give the penalty provision limited application (see below, p. 8).

(6) The petitioner's theory of impairment is apparently based on his contention that the equality or uniformity of cost to handlers, sought by the court below, is "not possible of attainment" (p. 6). But such contention is merely a

[1] The Act authorizes the classifying of all milk, Sec. 8c(5)(A).

fact issue and until after the court below (concurring with the Hearing Examiner) found the facts against it the Government rested its case upon its having attained such uniformity.

(7) The petitioner's theory of impairment of administration must rest on the contention that, if he is denied the implied power to "protect the pool" from competition of non-pool suppliers by levying the exactions or penalties involved herein, no other appropriate course within the Act is open to him. In truth, Congress has specifically and expressly prescribed in Sec. 8c(5)(D) [1] of the Act the extent to which such protection is permissible with respect to milk; and in Sec. 8c(5)(G) expressly prohibited any such limitations on the marketing of milk products.[2] With respect to manufactured milk products, involved primarily in this case, this Court has already found that these must "necessarily meet the competition of low-cost production areas"; *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 550 (1939).

It is submitted that the Secretary's lawful powers are in no way impaired by the judgment below.

C. None of the other 44 federal milk orders has the unreasonable scope of the challenged New York provision.

Petitioner asserts (p. 5) that the order of the court below "casts a serious cloud on the legality of comparable provisions in the 44 other milk orders in effect under the Act" and claims his administration will be "seriously impaired" (p. 21). This Court is already aware that "always, as in this case, the Government * * * pleads that paralysis will result if its claims to power are denied * * *"; *Woods*

[1] Sec. 8c(5)(D) is discussed more fully below, p. 17.

[2] Sec. 8c(5)(G) is discussed more fully below, p. 19.

v. *Miller Co.*, 333 U. S. 138, 146 (1948). Before the Court of Appeals, the Government raised no such fears, claiming only that "numerous orders require [comparable] payments" and citing only 4 orders (Brief for Appellee, pp. 27-28) instead of 44.

Petitioner's Appendix C (p. 41) itself discloses (column A) that only 19 other orders contain any kind of penalty payment on non-pool or "other source" milk, otherwise unregulated, through a producer settlement fund; that the majority, or 25, contain no such provision whatever. Examination, however, discloses that not one of these 19 other orders has the wide and unreasonable scope of the New York order before this Court:

(1) With a few possible exceptions, the orders impose no payment upon cream or condensed milk acquired for manufacturing purposes, i.e., for disposition in the manufacture of other products. This much of the penalty provision herein imposed upon respondent has even been eliminated from the New York order (see above, p. 5) for the reason set forth in *United States* v. *Rock Royal Cooperative, Inc.*, quoted *supra*, p. 7.

(2) In at least 13 out of the 19 other orders the penalty is not determined upon the basis of the butter price as computed in the New York order Class IV-A price, but rather upon the basis of an average price for numerous manufactured products, classified as Class II or III. Thus, the penalty amount has a different basis or is lower than that in the New York order.

(3) In at least the following 7 orders the penalty provision is inapplicable to cream, condensed milk and other milk products: Boston, Cincinnati, Cleveland, Detroit, Lowell-Lawrence, Springfield and Worcester.

(4) In the following 6 orders the penalty provision is not applicable to "emergency" supplies, or when pool milk

is not available: Boston, Chicago, Cleveland, Duluth-Superior, Topeka, Wichita.

(5) In 6 orders the penalty applies only to plants receiving less than 50% (Cleveland) or none (Lima and Dayton-Springfield) of their supply from pool producers; or selling less than 10% of their receipts as Class I milk in the area (Neosho Valley); or only to milk which violates health regulations or is from a plant suspended from pool participation (Chicago); or is inapplicable to milk shipped from a non-pool to a pool plant (Kansas City).

There are 45 different federal milk orders in as many different markets, varying in language and effect, but alike in the degree of complexity. At the very best, if the decision below may have any general application this is the proper situation in which to await some conflict of decisions among the courts of appeals in all of the circuits of which some of these orders are effective. It is submitted that the present case has no such public or national importance as to warrant the issuance of a writ.

II. Petitioner is merely seeking a review of evidence

This Court has repeatedly held that it will not grant a certiorari to review the evidence, *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938); or to determine primarily a question of fact, *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508 (1924); and it will "leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality" of evidence, *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951). Therefore, a writ should not be granted upon this petition.

It is agreed that, for the most part, the payments which the invalidated provision required respondent to make on non-pool cream and condensed milk consisted of the difference between the New York order class price for pool milk utilized in such products (Class II-A, cream; II-B, condensed) and the Class IV-A price for pool milk used in butter.

Before the Court of Appeals, the Secretary urged that the debated provision was authorized by Section 8c(5)(A) and (B) of the Act, and particularly within the terms thereof authorizing payment of "uniform" prices and "methods for fixing" such prices (Brief for Appellee below, pp. 8, 28-30). At the promulgation hearing the Department maintained that this payment would insure that the minimum cost (of non-pool milk) to handlers is "the same" as the regular class price of pool milk (I R. 40a) (Brief for Appellee below, pp. 16, 18). The Secretary adopted the provision to prevent "inequality" (I R. 50a). The petitioner also advised the Court of Appeals that the objective of the debated provision was to prevent such displacement (of pool milk) as may result from the lack of "equivalent cost" of non-pool milk; and that witnesses testified to the payment as necessary to achieve proper "uniformity" between pool and non-pool milk and milk products prices (Brief of Appellee below, p. 17). The Court of Appeals, however, found the penalty payment on the evidence herein (II R. 107) to be excessive [1] and discriminatory against non-pool supplies.

In so ruling, the court determined [2] the crucial fact issue as follows (II R. 107):

> "However, there is no substantial evidence in the record of the promulgation hearings which would indicate that the initial cost of non-pool cream and condensed milk would be the New York Class IV-A price."

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[1] The Hearing Examiner also found the payment to be excessive and "prohibitive" (I R. 29a) with respect to non-pool supplies.

[2] The dissenting judge did not find otherwise on this fact issue.

The petitioner now bases his prayer for a writ (Petition, pp. 6, 13) on the claim that the court below is attempting to compare "incommensurables" and that "no such uniformity is possible". Here is a complete about-face; the petitioner, when before the Court of Appeals, urged upon it exactly the factual comparison and the uniformity which it now tells this Court is impossible; the Brief for Appellee below stated (p. 21; also p. 19):

> "In the light of all the evidence, it is manifest that the minimum price at which handlers can reasonably be expected to purchase substantial quantities of non-pool milk and milk products will be the Class IV-A price under the New York order * * *."

This is a clear case of an effort to secure a writ to review a fact issue urged by the petitioner and resolved against him by the court below. See cases cited *supra*, p. 9.

The petitioner (p. 13 *et seq.*) questions the majority opinion below upon another fact issue, i.e., whether there appeared such administrative difficulties as could justify use of the Class IV-A price of pool milk as distinguished from the "actual" cost of non-pool milk or milk products in determining the amount of the penalty. However this much is certain: a payment of only 2 cents per 100 pounds of milk (equivalent to about 20 cents per can of cream (40 qts., 40% butterfat)) was found discriminatory in *Brannan* v. *Stark*, 342 U. S. 451 (1952); but in the instant case the payment amounted to $8.65 per can of cream and 80 cents per 100 pounds milk (II R. 105, footnote). The excessive cost of non-pool cream over pool cream averaged $6.20 per can over an eight-month period (I R. 131a). This extraordinary penalty was too great to excuse as an incident of administrative difficulty.

Insofar as the court below deals with milk regulated by the Cleveland Order, the petitioner merely quibbles (p. 16) with some words in the opinion. That court properly found that the Cleveland class price (of raw milk, of course) "in most cases" would not be the cost to a New York handler

of Ohio milk products, because such cost must include the (gross) profit of the Ohio processor or seller (II R. 108); that therefore a penalty based on the plus difference between the Cleveland and New York (raw milk) class prices, by failing to take into account such actual cost, would result in a discriminatory payment against the handler of the non-pool product. Petitioner takes issue (p. 16) with this finding on the ground that instead of saying "in most cases it will not be the exact cost", the court should have found that it is "never" the actual cost. This position obviously does not help petitioner.

The majority below said "It may be argued that a slight disparity in price would be justified" if the record showed any administrative necessity therefor. But no such necessity appeared; and the Administrator's bills showed a disparity of as much as $3.14 per can of cream (payment of $169.49 on 54 cans, I R. 101a), a penalty exceeding 10% of the selling price. Thus, insofar as concerns payments under Subsection (2)(i) in relation to the "uniform" prices requirement of Section 8c(5)(A) of the Act, the discussion above applies with equal force: the writ will not issue to review the evidence.

III. The decision below is clearly correct

The decision below is so clearly correct as not to warrant the further consideration of this Court.

A. The provision violates Sec. 8c(5)(A).

The theme of the petition (pp. 8-13) is that the debated provision constitutes a "reasonable protection of the 'pool plant' method of regulation" (p. 13), for two reasons alleged: (1) that it prevents the "dumping of surplus milk and milk products from non-pool plants" at prices which undermine (p. 5) or undercut regulated supplies (pp. 11, 13); and (2) that it "guard(s) against the non-pool milk and milk products displacing the regular source of supply" (p. 12). The Court of Appeals found that the contested provision went far beyond either basis advanced for its reasonableness:

(1) Instead of preventing the "dumping" of surplus non-pool milk and milk products to undermine or undercut pool supplies, the provision arbitrarily created "a price discrimination" (II R. 107) against a handler purchasing non-pool supplies. As the court below found, "No consideration was given to the price actually paid" for non-pool supplies (II R. 105). Indeed, the penalty attached even when the price of non-pool cream exceeded that of pool cream: December 1945, Ex. 71 (I R. 131a). Thus, the provision in fact bore no reasonable relation to the first reason advanced.

(2) Instead of preventing non-pool supplies from "displacing" pool milk (Petition, pp. 2, 12), the penalty attached to all non-pool receipts irrespective of whether pool supplies would be displaced thereby. As the court below found, the penalties "are likewise required even if the plaintiff's purchases from the Ohio plant were made at

times[1] when no [pool] milk was available in the New York market area for processing into cream or condensed milk" (II R. 105). Therefore, the challenged provision bore no reasonable relation to any reason given for its adoption.

In truth, the invalidated provision was simply an unauthorized method of accomplishing an unauthorized purpose: a "load" (see dissent, II R. 111) on non-pool supplies to prevent any kind of competition at any time between such supplies and pool milk products.

Petitioner, when before the Court of Appeals, urged that the exaction herein was specifically within the pricing provisions of Section 8c(5)(A) and (B) of the Act (Brief for Appellee, below, pp. 28-30):

> "The payment required to be made in this case constitutes an addition to the producer-settlement fund, and is reflected in the computation of the uniform price to be paid to the producers under § 8c(5)(B)(ii) of the Act. The statute does not prescribe a specific method of fixing prices under § 8c(5) of the statute. The words of the Act are of wide and comprehensive meaning. Any method may be used for fixing class prices under § 8c(5)(A) of the Act, and § 8c(5)(B) is likewise without restriction as to the method of fixing the uniform price to producers. * * *"

Petitioner, adopting the reasoning of the dissenting judge, now contends much differently: that the payment herein is not a "price" and that "producers" as used in these

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[1] The period in controversy was marked by war-created shortages of milk and milk products (I R. 118a, 123a, 124a). The New York City Board of Health even forbade the use of approved (pool) milk for processing purposes as distinguished from fluid needs (I R. 102a, 103a). Respondent could not have purchased pool supplies in any event (II R. 91a, refused 95a). Nevertheless, the penalty attached. Effective October 1, 1946 (I R. 16a) the order was even amended actually to spell out the application of the penalty (although at a somewhat lower rate, see Petition, p. 13, note 14) during periods of "inadequate supply" of pool cream or condensed milk.

sections excluded "non-pool producers"[1] (Petition, pp. 16 and 18), and that therefore the uniformity requirement of Section 8c(5)(A) is inapplicable. The majority, ruling upon the order as the Secretary wrote it (Section 927.7 (b)(3); I R. 15a, p. 18 of the order) and administered it[2] necessarily concluded that if the payment of this money *out* of the fund was a price (or part of a price) to producers on all the milk under Section 8c(5)(B)(ii), then the payment of this money by handlers *into* the fund, based upon the class-in-which-used prices (of milk purchased by handlers from pool producers) enumerated in the challenged provision, similarly constituted a price (or part of a price) "for each such use classification which all handlers shall pay * * * for milk purchased from producers.[3] * * * Such price(s) shall be uniform to all handlers" (Section 8c(5)(A)).

The court below found, in its very realistic opinion, that the order as prescribed by the Secretary had two consequences: (1) for milk products so used which respondent bought and received from non-pool plants, here involved, respondent paid (a) part of the price in the amount he paid to his vendor and (b) part of the price in the amount required to be paid to pool producers under the invalidated provision; but (2) for pool milk products which other handlers used, their price consisted only of the amount they paid to their vendors.

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[1] Before the Court of Appeals, the Government urged that "producers" included "any person" producing milk; Brief, p. 26.

[2] Petitioner now claims for the first time (p. 16) that the penalty payment herein is "not a 'price'" under the Act at all; and (p. 17) that the court below erred in deeming such payment "part of the 'minimum price'" (II R. 107). This is another about-face: for 17 months the petitioner's agent, the Market Administrator, sent monthly billings to the respondent in which the penalty amounts were expressly stated to be "priced" (I R. 96a and footnote; 98a-100a).

[3] The Government has always maintained that "The Act does not require a direct or specific relationship between the handler and the dairy farmers or producers of the milk"; see its Brief for Appellee below, p. 28.

Thus, respondent was required to make payment (b) to pool producers, whereas other handlers buying pool milk or milk products made no such payment thereon to pool producers.

Judge Learned Hand did not seem to realize that the lack of uniformity herein lay primarily in the fact that handlers of non-pool milk products had to make payments to pool producers which handlers of pool milk products were not required to make to pool producers; that therefore the lack of uniformity lay directly between handlers under Section 8c(5)(A), respecting payments made to pool producers.

The Secretary expressly wrote into his order that the payment herein was part of the price to producers. If the dissenting judge concluded that it was not a price or part of a price to producers, he should have invalidated the order on this very ground, instead of re-writing it so as to be (in his opinion) sustainable. Indeed, Judge Learned Hand even re-wrote the Secretary's findings: these findings supported the payments herein as "preventing" inequality as between pool and non-pool milk (I R. 50a); in direct contrast, the dissent sustained the payment as having "compelled • • • unequal terms" and as having "denied equal terms" to non-pool handlers (II R. 111).

This Court long ago held that an administrative order cannot be upheld unless the grounds upon which the agency acted were those upon which its action can be sustained; *Interstate Commerce Commission* v. *Chicago, etc. Railroad Company,* 186 U. S. 320, 341-342 (1902); see also *Securities & Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 87, 93-95 (1943).

B. The invalidated provision is not an "incidental" one.

The fact is that there is nothing "incidental" about the invalidated provision. Both the majority opinion below (II R. 105) and the minority (II R. 109) concurred in the finding of the Office of Hearing Examiners (I R. 29a) that the payment herein is a "penalty". The word "exaction"

now adopted by petitioner (pp. 9 note, 16, etc.) helps him little;[1] 32 C. J. S. 1146.

If the penalty payment herein is not what the Secretary made it, i.e., part of the price to producers, it becomes what Judge L. Hand called it: a "load" on competition, which "denied him (the non-pool handler) * * * the privilege" of competing in the market on equal terms with pool handlers (II R. 111); "a handicap (which) would diminish the amount which entered the marketing area" (II R. 113). Such a "load" or "handicap" to prevent competition is an extraordinary measure, not an incidental one. Action of the kind herein has been called "feather-bedding"; *United States* v. *Petrillo*, 332 U. S. 1, 13 (1947). This Court has squarely held that the authority to prevent competition may not be implied as an incidental power: *Federal Trade Commission* v. *Bunte*, 312 U. S. 349 (1941); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 389 (1951); and this is true even when failure of the agency to have power over leasing of gas reserves may threaten its pricing functions, *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 508 (1949). Prevention of competition is peculiarly a subject for Congress, and will not be implied from merely incidental administrative powers.

C. The invalidated provision is inconsistent with Section 8c(5)(D).

The problem of competition in the sale of milk and milk products from other markets was before the Congress dur-

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[1] The word "differential" used in the dissenting opinion (II R. 112) is even less helpful to petitioner. The Act clearly states that payments for milk by handlers and to producers under both Sec. 8c(5)(A) and (B) shall be "subject only to adjustments for volume, market and production differentials customarily applied by the handlers"—and "no others", as noted in the opening lines of Sec. 8c(5)—and no one has ever suggested the payment herein to be one of the authorized differentials.

ing the legislative process leading up to passage of the Agricultural Marketing Agreement Act of 1937. Congress made express provision "to prevent assaults upon the price structure" of regulated milk, through Sec. 8c(5)(D) of the Act. This section was intended as the "only" way of meeting the problem of such competition: *Hood & Sons* v. *DuMond*, 336 U. S. 525, 544 (1949).

Since Congress expressly manifested concern over competition between regulated milk and other milk, it expressly showed in Sec. 8c(5)(D) that such subject also was not deemed an "incidental" one.

Congress was alert to the competitive nature of the milk industry. The debates were devoted to the proposition that, in order to protect priced milk against competition, all milk brought into the market was intended to be priced (79th Cong. Rec.; Part 9, pp. 9480, 9572, 13022). Congressman Jones summarized the intent of Congress to meet competition by prescribing the same price (rather than by "loading competition"); on August 13, 1935, he said:

> "Under the provisions of this bill if a price were fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price" [under Sec. 8c(5)(D)].

This much is certain: Congress was very much aware of the problem of competing milk and milk products. Yet the only method which it prescribed for treating competing supplies differently was that in Sec. 8c(5)(D). Hence, the invalidated provision is inconsistent therewith.

D. The invalidated provision is inconsistent with Sec. 8c(5)(G).

This case primarily involves milk products (cream and condensed milk) as distinguished from milk. In Sec. 8c(5)(G), the Congress said that an order shall not "prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States".

It is submitted that the dissenting opinion completely overlooked the final Conference Report No. 1757 (74th Cong., 1st Sess.), p. 21, reading partly as follows:

> "The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc."

The necessary construction of the last sentence is that this provision does negative the applicability to milk products of the provisions of the law relating to prices and payments. And the broad statutory words "in any manner" speak volumes.

Judge Hand expressed his belief that the word "limit" in Sec. 8c(5)(G) means only "express quantitative limit" (II R. 113). But this cannot be so; because when Congress meant such quota or physical limitations, it actually said so: Sec. 8c(6) of the Act respecting non-dairy commodities.

Judge Hand stated that Sec. 8c(5)(G) "was not intended to touch the price of • • • milk products" (I R. 112-113), and herein lies grave error. The best proof that it was in-

tended to prohibit the pricing of milk products lies in the fact that the Secretary, in the administration of this Act, never placed a price or minimum price or charge of any kind against any milk product (pool or non-pool) prior to his adoption of the challenged provision; and with respect to pool or fully regulated supplies, the Secretary has never prescribed any price or other charge against any milk product to this day. Congress left product prices alone, partly since these must "necessarily meet the competition of low-cost production areas", *United States* v. *Rock Royal Cooperative, Inc., supra,* p. 7. Beyond question, under Sec. 8c(5)(G) of the Act the Secretary could not "economically handicap" and thereby "diminish" (II R. 113) the marketing of milk products in the area. The invalidated provision is inconsistent with Sec. 8c(5)(G).

E. Respecting Class II-B, the invalidated provision falls for lack of procedural due process.

As the Hearing Examiner determined (I R. 27a), the rule-making Hearing Notice on the subject of the debated provision made no mention of Class II-B milk or plain condensed milk, and no testimony was taken thereon. Indeed, even the Notice of Report was also silent on Class II-B (I R. 50a), and therefore no one ever had the opportunity to file exceptions to its sudden inclusion in Sec. 927.8(e). No rule was ever so lacking in procedural due process.

The Secretary's disregard for his limited authority here typifies his disregard for it in the substantive aspects of this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 300

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

Charles F. Brannan, Secretary of Agriculture of the United States,

Petitioner,

v.

Charles Kass, Individually and Trading as Babylon Milk and Cream Company,

Respondent.

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In the brief opposing certiorari (pp. 2-9), respondent disputes our statement (Pet. 5) that this case involves a question of basic importance in the administration of the Agricultural Marketing Agreement Act of 1937 and the 45 milk orders effective under that Act. There is no claim that the case has become moot, but the respondent asserts that the "administrative order involved herein is no longer in effect" and that "the judgment below does not impair the operation of the New York and other milk orders." If that assertion were true, we would not have burdened the court with this petition.

I. THE ISSUES WITH RESPECT TO THE NEW YORK ORDER HAVE NOT LOST SIGNIFICANCE BY REASON OF THE AMENDMENTS TO THE ORDER.

The New York milk order has been continuously in effect since 1939, although it has been amended numerous times to meet changing economic conditions affecting the supply of and demand for milk in the largest metropolitan area in the United States. The provisions requiring payment into the producer-settlement fund with respect to milk and milk products obtained from "non-producer" sources have been an indispensable part of the order since the inception of the pool plant method of regulation effective August 1, 1945, and with modifications, minor in relation to the important principles involved in this case, are currently in effect (7 CFR 1951 Supp. § 927.78).

The New York order now requires, and has required since 1945, payments to be made into the producer-settlement fund on milk and milk products received from "non-producer" sources and classified in the primary classifications (Class I and Class II) of the New York order. If milk is classified and priced under another Federal order the amount of the payment has always been any "plus amount" derived from subtracting the value of the milk under such other order from the value computed under the New York order. 1/ If "non-producer" milk is not subject to another Federal order but is classified in the primary classifications of the New York order (Classes I-A, II-A, or II-B during the period in dispute or Class I-A or Class II under current provisions) payment has always been required in an amount representing the difference in value between milk thus classified

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1/ A comparison of 7 CFR 1945 Supp. § 927.8(e)(2)(i) with 7 CFR 1951 Supp. § 927.78(b)(1) will demonstrate that the language is virtually identical.

and the reserve or surplus class (Class IV-A during the period in dispute and Class III under the current order). The present order provisions do not purport to insure that the actual price handlers pay for non-pool milk and non-pool milk products will be uniform with the price handlers are required to pay for pool milk, and therefore the present order provisions do not differ in this respect from the order provisions before the amendments. 2/

Under the current order there would be no payment required with respect to condensed milk because milk in this product is now classified in Class III. 3/ But the payments on condensed milk are a relatively minor part of the total payment provisions invalidated by the decision of the Court of Appeals. Payments are still required on "non-producer" milk in Class II (formerly Class II-A), the cream classification. Hence, if respondent receives cream from "non-producer" sources and the milk used for this cream is classified in Class II, a payment is still required and in an amount substantially in excess of that charged the respondent during the

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2/ The respondent's assertion, br. pp. 6-7, 10-11, that in the court below "the Government rested its case upon its having attained such uniformity" is not true. The Government has never contended that the actual price handlers pay for non-pool milk and milk products is equal to the price handlers are required to pay for pool milk. The Government's position is unchanged that effective regulation cannot be based on the actual price paid by handlers for non-pool milk and milk products. Also, contrary to the assertion by the respondent, br. pp. 14-15, the Government has never contended that the challenged payment is part of the "price", as respondent uses that term, which handlers must pay under § 8(c)(5) of the Act, and the Government has never contended that "any person producing milk" is a "producer" under § 8(c)(5) of the Act. Our position in this respect was sustained by Judge Learned Hand and there is no basis for the respondent's assertion, br. p. 16, that Judge Hand did not understand the issues involved.

3/ This change in classification became necessary in 1949 because the New York City Health Department changed its requirements by authorizing the use of unapproved milk in frozen desserts, including condensed milk. 14 F.R. 1176, 1178.

period in controversy for cream classified in Class II-A. 4/

Contrary to the assertion in the respondent's brief, a determination of the issues of this case is of vital importance to the Federal regulation of milk in the New York area. This importance was emphasized as recently as July 1952 at a hearing on a proposed new Federal milk order to regulate milk in the present New York area and certain additional metropolitan areas in New Jersey. Representatives of the handlers of more than fifty percent of the milk marketed under the current New York order and representatives of producers of more than eighty percent of the milk subject to such order testified that if compensatory payment provisions of milk orders - as involved in this case - are invalidated, effective regulation in the New York-New Jersey area would be impossible. 5/ No witness offered any testimony in refutation of the position taken by these witnesses or suggested any substitute for these payments. A brief 6/ filed by the Milk Dealers Association of Metropolitan New York, Inc. and Sheffield Farms Company, Inc. with respect to that rule making proceeding states on pages 7 and 8:

> "In view of the decision in the Babylon case (Kass [Individually and Trading as Babylon Milk and Cream Company] v. Brannan, 196 F. 2d. 791 [C.A., 2d]), however, the legality of provisions for compensatory payments is in considerable doubt. If on appeal in the Babylon case or in some other case it should be determined that compensatory payments are illegal per se, a most serious problem would result in regard to a marketwide pool covering the New York-New Jersey marketing area.
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> * * * * *
>
> "We have considered this problem most earnestly and have been unable to see any solution with respect to the proposed enlarged marketing area if compensatory payments should be held illegal."

4/ For example, the difference in price per hundredweight between the Class II-A price and the Class IV-A price in October 1946 was 39.7 cents, whereas the difference in price per hundredweight between Class II and Class III in October 1952 was 65.3 cents. Comparable figures for July 1946 and July 1952 are 24.9 cents and 57.5 cents respectively. See Market Administrator's Bulletin, January 1947, Vol. 7, No. 1, p. 9; Market Administrator's Bulletin, August-October, 1946, Vol. 6, No. 5, p. 15; Market Administrator's Bulletin, August 1952, Vol. 12, No. 8, p. 5; and Market Administrator's Announcement of Class Prices, Nov. 5, 1952.

5/ This testimony appears in the transcript of hearing with respect to a proposed marketing agreement and order regulating the handling of milk in the New York-New Jersey Metropolitan Marketing Area, Docket No. AO-241 (pp. 3674-75, 3766-3807, 4170-4187, 4572-4574). This hearing record is a public record on file in the Office of the Hearing Clerk, United States Department of Agriculture.

6/ This brief is filed as a part of the record in the hearing with respect to a proposed marketing agreement and order regulating the handling of milk in the New York-New Jersey Metropolitan Marketing Area, Docket No. AO-241. This record is a public record on file in the office of the Hearing Clerk, United States Department of Agriculture.

II. THE DECISION OF THE COURT OF APPEALS SERIOUSLY AFFECTS THE 44 OTHER MILK ORDERS NOW IN EFFECT

The conditions (Pet. 8-12) which made the inclusion of the disputed payment provisions in the New York order essential in 1945 have arisen, with certain variations due to local conditions, in 19 other major Federal milk marketing areas, 7/ and at any time economic conditions may require the inclusion of such provisions in other orders.

The minimum price structure for milk received at pool plants would obviously collapse if unregulated and unpriced milk could enter the area and undermine the order prices. The only effective way of preventing this is to provide a payment into the producer-settlement fund with respect to "non-producer" milk disposed of in the marketing area in one of the primary classifications. In the New York order and in each of the 19 other marketing orders, handlers are required to pay to "producers," through a producer settlement fund, on non-pool milk and certain non-pool milk products a sum which will reasonably protect the pool plant milk and prevent its being displaced by the milk and products from non-pool plants. If the decision of the court below is correct, it follows that the payment provisions in each of the 20 Federal milk marketing orders are in this respect invalid.

In addition the majority opinion of the court below casts serious doubt on the legality of the entire method of regulation involved in the 45 milk orders now in effect. In each of the 45 milk orders, the Secretary has defined the "producers" who come within the ambit of the regulation. But under the decision of the Court of Appeals, "dairy farmers" who are not "producers" under the order are nonetheless "producers" under § 8(c)(5)(A) of the Act. Hence, all dairy farmers whose milk entered the marketing area in the form of milk or milk products would be entitled to receive the uniform price under § 8(c)(5)(B) of the Act, thereby invalidating the

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7/ Boston, Chicago, Cincinnati, Cleveland, Dayton-Springfield, Detroit, Duluth-Superior, Ft. Wayne, Kansas City, Lima, Louisville, Lowell-Lawrence, Neosho Valley, Paducah, Puget Sound, Springfield, Mass., Topeka, Wichita, and Worcester.

entire plan of regulation now in effect in every milk order in the country. A fortiorari serious doubt exists with respect to the validity of the pool plant method of regulation in effect in New York since 1945.

Every milk order now in effect has some type of provision which requires non-producer milk to be allocated to the lowest or lower uses without regard to the price paid by the handler and without regard to the actual use made of that non-producer milk. See, e.g., Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87 (C.A. 8), certiorari denied, 329 U.S. 788. The respondent urges, br. p. 6, that this method of assignment is an effective method of favoring regulated pool supplies. 8/ But with respect to each of these provisions, there is no guarantee that the cost to handlers of milk or milk products from unregulated sources will be the same as the cost to handlers of regulated milk or products made from regulated milk. Hence, there is a serious doubt as to the legality of each of these vital provisions if the decision of the Court of Appeals in this case is not reversed.

It is our view that the questions presented in this case are of extreme importance to the effective regulation of milk under the Agricultural Marketing Agreement Act of 1937 and sufficient to justify review by this Court.

Respectfully submitted,

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U. S. Department of Agriculture

November 1952.

8/ Although the allocation provisions are a necessary feature of milk marketing orders, these provisions by themselves do not furnish a complete solution to the problem of unregulated milk. In 20 marketing areas payment provisions such as the provision invalidated by the Court of Appeals in this case have been found necessary to cope effectively with the vexing problem of unregulated milk sold in the regulated market.